IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 11, 2008 Session

MICHAEL SANFORD v. WAUGH & COMPANY, INC. ET AL.

Appeal from the Chancery Court for Davidson County
No. 05-943-III Ellen Hobbs Lyle, Chancellor

No. M2007-02528-COA-R3-CV - Filed June 30, 2009

Plaintiff is a creditor of an insolvent corporation that owed him in excess of $1 million under the terms of a promissory note. Plaintiff sued the corporation and its owner to enforce the note. Defendants are former officers and directors of the corporation who instituted a direct action against Plaintiff shortly after the filing of his complaint alleging he fraudulently misrepresented the financial condition of the company. During the pendency of both actions, Defendants began winding down the corporation and disposing of assets in which Plaintiff claimed a security interest. Plaintiff believed Defendants were acting to enrich themselves and avoid paying Plaintiff under the note. After Defendants voluntarily dismissed their action against Plaintiff, Plaintiff sued Defendants for breach of fiduciary duty, fraudulent conveyance, malicious prosecution, abuse of process, conspiracy, and conversion. The trial court dismissed the abuse of process, breach of fiduciary duty, and conversion claims on summary judgment, limited the scope of Plaintiff's claim for fraudulent conveyance and conspiracy, and denied summary judgment on the malicious prosecution claim.

Following Plaintiff's proof, the trial court granted a directed verdict in favor of Defendants on Plaintiff's claim for punitive damages but denied the motion on the malicious prosecution and fraudulent conveyance claims. The jury returned verdicts in favor of Plaintiff awarding $51,000 in damages for malicious prosecution, $176,222 in damages for fraudulent conveyance, and found that Defendants conspired both to maliciously prosecute their claim against Plaintiff and to fraudulently transfer corporation assets. Both parties appeal issues on summary judgment, evidentiary rulings, and directed verdicts.

We have determined that Plaintiff sufficiently pled a cause of action for civil conspiracy based on facts alleged in the amended complaint and that, under the circumstances in this case, Plaintiff is entitled to assert a claim for breach of fiduciary duty directly against Defendants. We reverse the directed verdict granted in favor of Defendants on punitive damages and remand for a new trial on these issues. We further find that summary judgment was proper on Plaintiff's conversion claim and affirm the trial court's decisions allowing the claims for fraudulent conveyance and malicious prosecution to proceed to the jury.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part, Reversed in Part, Remanded

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Timothy L. Warnock and Sarah J. Glasgow, Nashville, Tennessee, for the appellant, Michael Sanford.

Gregory D. Smith and Alexandra T. MacKay, Nashville, Tennessee, for the appellee, Carol Waugh; Joseph A. Woodruff and Keenan Carter, Nashville, Tennessee, for the appellees, Troy Waugh and Waugh & Company, Inc.

OPINION

Factual Background[1]

Michael Sanford and Bruce Prow formed a company in 1995 called SecureOne, Inc. which sold and serviced security systems. SecureOne was an authorized dealer of ADT Security Services, Inc.[2] Sanford and Prow each owned a 50% interest in SecureOne. In the summer of 2002, Sanford and Prow had a disagreement regarding the management of SecureOne and began negotiating the sale of Sanford's interest in the company. In December 2002, Sanford sold his shares of SecureOne to Prow and his wife, Leslie Prow, for $3,000,000. The parties executed a Settlement Agreement detailing the transaction. Sanford received $1,000,000 in cash at closing, a Secured Promissory Note ("the Sanford Note") for the remaining $2,000,000, and a Security Agreement granting Sanford a security interest in SecureOne's assets. Under the Sanford Note, Sanford was to receive 30 equal payments of $70,166.50 on the first day of each month. The Sanford Note was executed by Bruce Prow, Leslie Prow, and SecureOne.

Before the stock sale, Prow approached Troy and Carol Waugh, his in-laws, for the funds necessary to purchase Sanford's interest. Unbeknownst to Sanford, the Waughs purchased 25% of SecureOne stock for $100,000 and invested $900,000 in SecureOne in the form of a loan at or near the time of Sanford's stock sale. SecureOne executed two promissory notes on December 19, 2002: one to Troy and Carol Waugh in the amount of $425,000 and another to Waugh & Co. for $475,000[3] (collectively referred to as "the Waughs" or "the Defendants"). Both of the promissory notes stated that SecureOne would pay the Waughs interest on the outstanding principal balance(s) at a rate of

---

[1]The record in this complex litigation includes thirty volumes of technical record, four volumes of trial transcript, ninety exhibits or offers of proof, and additional filings under seal. We summarize the relevant facts in chronological order and as concisely as possible.

[2]SecureOne sold both residential and nonresidential security systems. SecureOne would then sell those contracts to ADT. If a customer did not meet ADT's credit requirements, SecureOne would retain and service the account directly for a $30 monthly fee. These were called "house accounts."

[3]Waugh & Co. was Troy Waugh's business which provided consulting services and marketing training to accountants.

prime plus 5%. SecureOne also executed a Loan and Security Agreement ("the Waugh Agreement") detailing the $900,000 loan, listing the Prows as guarantors secured by their 75% stock interest.

After the sale of Sanford's shares, Troy Waugh convened a meeting of the board of directors at which time Bruce Prow was elected president/chief executive officer of SecureOne, Leslie Prow was elected vice president of finance/treasurer of SecureOne, Carol Waugh was elected secretary of SecureOne, and Troy Waugh was elected chairman of the board of directors.[4] In accordance with the Sanford Note, SecureOne began making monthly payments to Sanford in February 2003 and made timely monthly payments until December 2003. SecureOne was late on its December payment and incurred a late fee of 10%. After Sanford did not receive the January 2004 or February 2004 payments, he filed suit to enforce the Sanford Note.

SecureOne's business began to wane in 2003. Sales declined rapidly and many employees either quit after SecureOne cut their pay or were terminated. The Waughs made additional loans to SecureOne in 2003. According to the testimony at trial, the Waughs loaned $70,000 in August 2003. In October 2003, the Waughs foreclosed on the Prows' shares of stock after SecureOne defaulted, thereby coming into 100% ownership of SecureOne. In December 2003, the Waughs loaned another $120,000 to SecureOne and took a security interest in SecureOne's house accounts to secure the indebtedness.[5] A First Amended and Restated Promissory Note dated December 31, 2003, indicates that the interest rate on the outstanding loans was reduced to 4%.

Before Sanford acted to enforce the Sanford Note, he met with Troy and Carol Waugh in the early part of 2004. During this meeting, Mr. Waugh informed Sanford that SecureOne could not afford to pay him. The Waughs offered Sanford approximately $650,000,[6] SecureOne's house accounts, and SecureOne's trucks to settle the remaining debt. As of January 2004, Sanford was owed approximately $1.3 million. Sanford declined their offer and filed suit shortly thereafter. At or around that same time, the Waughs decided to wind down SecureOne and began closing SecureOne branch locations.

Later in 2004, Bruce and Carol Prow began another company, Security Networks, that sold security alarm systems in direct competition with SecureOne. At this point, the Prows had moved SecureOne operations into their home and ran Security Networks out of the same room. Bruce Prow purchased furniture, two trucks, and two cars from SecureOne; one truck was purchased for $9,200 and later resold for $9,600. The three desks used in the Prows' home were from SecureOne. Additional SecureOne equipment and furniture was stored in the Prows' garage. Most important, according to Sanford, was the Prows' transfer of SecureOne's phone number over to Security

---

[4] The Waugh Agreement previously executed already envisioned these appointments of SecureOne officers and directors.

[5] In 2003, the house accounts generated revenue of approximately $30,000/month.

[6] This figure represents the Waughs' offer to pay Sanford $550,000 in cash and approximately $100,000 in exchange for providing consulting services to SecureOne.

Networks. Before the winding down, SecureOne received $1,173,213 on January 13, 2004, from ADT representing the lifetime equity built over the course of SecureOne's franchise agreement with ADT. In 2004, SecureOne paid Troy Waugh a total of $75,000 in consulting fees and paid Carol Waugh a total of $30,000 in consulting fees. Between 2003 and 2004, SecureOne paid Waugh & Co. a total of $48,883 in interest[7] and paid the Waughs a total of $55,991 in interest.

Procedural Background

Previous Lawsuit

On February 13, 2004, Sanford filed suit against Leslie Prow and SecureOne in the chancery court for Davidson County after SecureOne defaulted on the Sanford Note ("SecureOne Litigation"). At the time, Bruce Prow had already filed for bankruptcy. Initially, the Waughs consulted William Lassiter, the attorney who represented Bruce Prow in the 2002 stock sale, about the SecureOne Litigation. Mr. Lassiter advised the Waughs that he believed they had waived any claim for relief against Sanford pursuant to the release in the Settlement Agreement. Mr. Lassiter also believed he could be a potential witness in the SecureOne Litigation and referred the Waughs to attorney Winston Evans. The Waughs told Mr. Evans that Sanford had a conversation with Bruce Prow in December 2002 in which Sanford misrepresented the financial condition of SecureOne. Further, Troy Waugh claimed he saw a draft of a financial statement for November 2002 which did not reflect SecureOne's outstanding liabilities; no such document appears in the record. Sanford denies making any representation to either the Prows or the Waughs about SecureOne's finances and testified that he never drafted or created any financial statement during his tenure at SecureOne.

SecureOne and Mrs. Prow, then represented by Winston Evans, filed an answer and counterclaim on March 24, 2004, alleging that Sanford intentionally and/or negligently misrepresented SecureOne's financial condition at the time of the stock sale: specifically that he said "all debts of SecureOne were current and that there were no liabilities except those liabilities which were reflected on the balance sheet of SecureOne." They alleged SecureOne had "past due" liabilities amounting to $434,981.55. Troy Waugh, Carol Waugh, and Waugh & Co. later filed a separate action against Sanford in chancery court on April 15, 2004, in which they alleged Sanford made fraudulent misrepresentations concerning SecureOne's financial condition and debt ("Waugh Litigation").

Throughout the SecureOne Litigation and the Waugh Litigation, Sanford was represented by attorney John Jacobson.[8] Mr. Jacobson made a demand for arbitration in accordance with the Security Agreement. Mr. Jacobson withdrew the request once it became clear that arbitration would likely be unsuccessful and moved to expedite discovery. The parties engaged in a number of

[7] SecureOne paid Waugh & Co. $1,950 in interest in 2005.

[8] Mr. Jacobson's partner, Tim Warnock, represented Sanford in the lawsuit currently on appeal. Troy and Carol Waugh were divorced at the time of trial and had separate representation.

discovery disputes before the Waughs voluntarily dismissed their complaint against Sanford on March 11, 2005.

In April 2006, the trial court awarded Sanford a judgment in the SecureOne Litigation in the amount of $1,560,000. Shortly thereafter, Leslie Prow filed for bankruptcy. Sanford received approximately $170,000 in satisfaction of the judgment. The Waughs claim this amount represented the net proceeds from the sale of SecureOne assets. Sanford received an additional check from Carol Waugh in the amount of $18.75 with "Balance 0" written on the memo line.

Lawsuit on Appeal

Before obtaining a judgment in the SecureOne Litigation, Sanford filed a complaint against Waugh & Co. and Troy and Carol Waugh on April 13, 2005, alleging causes of action for abuse of process, malicious prosecution, and breach of fiduciary duty. Sanford filed an amended complaint on September 12, 2006, adding claims for fraudulent conveyance, conspiracy, and conversion and sought both compensatory and punitive damages. The gravamen of Sanford's claims is that Troy Waugh, Carol Waugh, Bruce Prow, and Leslie Prow engaged in a course of conduct they knew would prevent SecureOne from paying Sanford and acted for their own benefit. Sanford specifically cited the following as alleged fraudulent conveyances in his complaint:

(1) payments by SecureOne to Security Networks;
(2) rent payments by SecureOne to Leslie Prow for use of property that Ms. Prow did not own;
(3) payments by SecureOne to Carol Waugh and Troy Waugh for "consulting" services that were not performed;
(4) interest payments by SecureOne to the Waughs;
(5) payments by SecureOne of Bruce and Leslie Prow's personal legal and accounting bills;
(6) the sale of assets to Security Networks; and
(7) the sale of SecureOne assets over Sanford's perfected liens.

Sanford maintains that the Waughs had no factual or legal basis for the fraudulent misrepresentation allegation asserted in their complaint and in SecureOne's countercomplaint and that the Waugh Litigation was instituted against him "for the improper purpose of delaying payment of the amount due and owed to [him] under the Settlement Agreement and Note. . . ." He further asserts that the Waughs dissipated SecureOne assets in which he held a first lien by transferring them to the Prows and/or Security Networks in effort to avoid their obligation.

The Waughs moved to dismiss all of Sanford's claims with the exception of the conspiracy claim and asserted an advice of counsel defense on the malicious prosecution allegation.[9] The motion for summary judgment on the fraud claims was based on Sanford's failure to plead fraud with sufficient particularity as required by Tenn. R. Civ. P. 9.02 and judicial estoppel.

On June 7, 2007, the trial court awarded summary judgment in favor of Defendants on Sanford's claims for breach of fiduciary duty, abuse of process, and conversion. The court denied summary judgment on the basis of judicial estoppel finding that the doctrine did not preclude Sanford's fraudulent conveyance claim. Instead, any contradictory assertions by Sanford regarding SecureOne's insolvency/solvency would bear on the weight of that evidence, not its admissibility. The trial court did, however, grant summary judgment on categories 1, 2, 5, 6, and 7 of the fraudulent conveyance claim because it found the Waughs were not transferees or subsequent transferees as required by Tenn. Code Ann. § 66-3-308(a). As to categories 3 (consulting fees) and 4 (interest payments), the trial court found there were genuine issues of material fact on whether value was received for those transfers and based on Tenn. Code Ann. § 66-3-306(a).[10]

Defendants filed a motion in limine on August 7, 2007, seeking to exclude testimony and/or evidence concerning ten different evidentiary matters. The trial court ruled on the Waughs' motion in limine by order dated August 17, 2007, and granted the motion to bifurcate the trial with respect to punitive damages. Relevant to this appeal is the court's limitation on Sanford's proof of the underlying conduct used to demonstrate conspiracy, i.e., exclusion of evidence concerning the Waughs' interference with contract,[11] the limitation of proof on Sanford's fraudulent transfer claim to consulting fees and interest payments only, thereby excluding evidence of principal payments made on the Defendants' loans to SecureOne, and the exclusion of John Jacobson's testimony.

A four-day jury trial was held August 20 through 24, 2007. Among the evidence presented was a report from Claude Balkenship, CPA, dated February 18, 2004, summarizing the outstanding SecureOne invoices and payables as of the stock sale on December 19, 2002, including payroll and taxes. Of the eighty entries, only one bill from Verizon in the amount of $177.38 was labeled "past

---

[9] An advice of counsel defense requires the defendants to establish that they sought an attorney's advice in good faith, provided the attorney with all material facts relating to the case, ascertained or ascertainable by the exercise of due diligence, and that there was "ample evidence" at the time of filing from which the attorney could conclude that the defendants had a reasonable chance to recover in the action filed. *Abernethy v. Brandt*, 120 S.W.3d 310, 314 (Tenn. Ct. App. 2002).

[10] "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation." Tenn. Code Ann. § 66-3-306(a). This section applies to a creditor who extended credit before the transfer or obligation occurs. *Id*. cmt. (1).

[11] Specifically, the trial court excluded as irrelevant to the remaining claims two "facts of consequence" argued by Sanford: (1) the sale of a Range Rover used by Leslie Prow for $65,000 of which Ms. Prow retained $30,000 and (2) SecureOne's payment of the Prows' personal legal expenses and accounting bills.

due." No SecureOne financial statement for either November or December was produced. Troy Waugh, Carol Waugh, Michael Sanford, Bruce Prow, and Winston Evans were the witnesses who testified at trial.

At the close of Sanford's proof, the Waughs moved for a directed verdict on the malicious prosecution claim, the fraudulent transfer claims, and Sanford's request for punitive damages. The trial court granted a directed verdict with respect to punitive damages and denied the motion on the malicious prosecution and fraudulent transfer claims. The Defendants did not present any additional evidence.

The malicious prosecution and fraudulent transfer claims were submitted to the jury resulting in a verdict in favor of Sanford. The jury awarded Sanford $51,000 on the malicious prosecution action finding Carol Waugh, Troy Waugh, and Waugh & Co. each liable in the amount of $17,000. The jury found that Defendants received fraudulent transfers, including money, of SecureOne and awarded $176,230 in compensatory damages, distributing liability as follows: $48,248 to Carol Waugh, $18,249 to Troy Waugh, and $109,733 to Waugh & Co. Next, the jury found that Troy Waugh, Carol Waugh, and Waugh & Co. conspired together with Bruce and Leslie Prow to maliciously prosecute the Waugh Litigation and/or the counterclaim filed in the SecureOne Litigation. The jury also found that Troy Waugh, Carol Waugh, and Waugh & Co. conspired together to fraudulently transfer SecureOne assets, including money. The verdict form did not provide for an award of damages on the conspiracy counts.

Following trial, Sanford moved for a partial new trial and also filed a motion for prejudgment interest and discretionary costs which the court later granted. Defendants' motion for judgment not withstanding the verdict was denied. Both parties appeal.

Analysis

Sanford's Claim for Civil Conspiracy

Sanford first takes issue with the trial court's finding that Sanford failed to sufficiently plead the tort of interference with contract and, therefore, was prevented from arguing it as the underlying tort or bad act necessary to establish a claim for civil conspiracy. As a result, Sanford was only allowed to proceed on the claims of conspiracy to commit malicious prosecution and conspiracy to transfer assets fraudulently. Sanford was not permitted to argue that the Waughs conspired to breach his agreement with SecureOne and the Sanford Note or to present evidence that the Waughs transferred anything other than consulting fees and interest payments to themselves.

"An actionable civil conspiracy is a combination of two or more persons who, each having the intent and knowledge of the other's intent, accomplish by concert an unlawful purpose, or accomplish a lawful purpose by unlawful means, which results in damage to the plaintiff." *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 703 (Tenn. 2002); *see also Strategic Capital Res., Inc. v. Dylan Tire Indus., LLC*, 102 S.W.3d 603, 610 (Tenn. Ct. App. 2002). A claim for civil

conspiracy "requires an underlying predicate tort allegedly committed pursuant to the conspiracy." *Watson's Carpet & Floor Coverings, Inc. v. McCormick*, 247 S.W.3d 169, 180 (Tenn. Ct. App. 2007). Conspiracy, standing alone, is not actionable where the underlying tort is not actionable. *Id*. at 179-80.

Tennessee requires parties to plead their claims in short and plain statements using simple, concise, and direct language. Tenn. R. Civ. P. 8.01, 8.05. One purpose of pleadings is "to give notice of the issues to be tried so that the opposing party can adequately prepare for trial." *Keisling v. Keisling*, 92 S.W.3d 374, 377 (Tenn. 2002). The Tennessee Rules of Civil Procedure also instruct courts to liberally construe all pleadings so "as to do substantial justice." Tenn. R. Civ. P. 8.06.

Sanford's amended complaint filed on September 12, 2006, contained a claim for "Conspiracy" which alleged that "Troy Waugh, Carol Waugh and other individuals acted in concert to engage in unlawful activities for the purpose of avoiding payment to Michael Sanford of the amounts due and owed to him under the Settlement Agreement and Note and defrauding the creditors of SecureOne." In this case, Sanford did not plead an independent claim of interference with contract. Sanford argues that he did not intend to assert the tort of interference with contract, only that Defendants' intent to avoid paying the Sanford Note constituted the underlying bad act necessary to show the conspiracy, an argument that he made throughout the SecureOne litigation and the instant action. Sanford's failure to plead the action does not necessarily mean he does not have a cognizable or actionable claim. The real issue is whether the underlying predicate tort required to support a claim for civil conspiracy must be separately pled.

We find the case of *Greene v. Brown & Williamson Tobacco Corp.*, 72 F. Supp. 2d 882 (W.D. Tenn. 1999), directly on point. In *Greene*, the plaintiff alleged claims of negligence, strict liability, and civil conspiracy. *Greene*, 72 F. Supp. 2d at 885. The plaintiff did not plead an independent cause of action for fraud but instead detailed specific allegations of fraud to serve as the underlying tort or bad act(s) in support of her civil conspiracy claim. *Id*. at 893. The district court reviewed the nature and viability of a conspiracy claim:

> It is a general rule that a conspiracy cannot be made the subject of a civil action, unless something is done which, without the conspiracy, would give *a right of action*. *The damage done is the gist of the action, not the conspiracy*. When the mischief contemplated is accomplished, the conspiracy becomes important, as it may affect the means and measure of redress. . . . [B]ut the simple act of conspiracy does not furnish a substantive ground of action.

Id. at 887 (quoting *Tenn. Publ'g Co. v. Fitzhugh*, 52 S.W.2d 157, 158 (1932)) (first emphasis added). The district court found the allegations in the complaint were sufficient to support the conspiracy claim even if the underlying fraud was not independently pled. *Id*. at 893. Thus, a conspiracy claim is dependent upon a plaintiff's right of action, not the pleading of the action.

Our review of relevant caselaw reveals civil conspiracy claims are dismissed most often because the underlying bad acts are simply not actionable or are dismissed on other grounds and no longer actionable. *See, e.g., Felts v. Paradise*, 158 S.W.2d 727, 728-29 (Tenn. 1942) (perjury in civil suit not actionable so conspiracy to commit that perjury not actionable); *McCormick*, 247 S.W.3d at 180 (carpet manufacturer's refusal to sell to retail dealer not actionable so conspiracy claim not actionable); *Levy v. Franks*, 159 S.W.3d 66, 82 (Tenn. Ct. App. 2004) (dismissal of underlying malicious harassment claim affirmed so conspiracy claim must fail). Here, as in *Greene*, Sanford alleged in short and plain language that the Waughs intended to interfere with the Settlement Agreement and the Sanford Note.

We find paragraph 43 of Count V in Sanford's amended complaint provided sufficient notice to Defendants that his conspiracy claim related to their alleged intent to interfere with SecureOne's contract and obligation under the Sanford Note. Based on our determination that the amended complaint imparted sufficient notice to Defendants of the nature of Sanford's conspiracy claim, we next address whether Sanford had a cognizable action for interference with contract against the Waughs.

Generally, under Tennessee law, "a party to a contract cannot be liable for tortious interference with that contract." *Cambio Health Solutions, LLC v. Reardon*, 213 S.W.3d 785, 789 (Tenn. 2006). Moreover, "a corporate director, officer, or employee is not liable for tortiously interfering with a corporate contract, because he is considered a party to the contract, as long as he is acting to serve the corporate interests, or unless his activity involves individual separate tortious acts." *Forrester v. Stockstill*, 869 S.W.2d 328, 333 (Tenn. 1994) (quoting Thomas G. Fischer, Annotation, *Liability of Corporate Director, Officer, or Employee for Tortious Interference with Corporation's Contract with Another*, 72 A.L.R. 492, 501 (4th ed. 1989)).

The contract at issue was between Sanford and SecureOne, Bruce Prow, and Leslie Prow. But, when the Waughs assumed their roles on the board of directors and later foreclosed on the Prows' shares, they became parties to the contract as officers, directors, and shareholders of SecureOne. To date, this court has not upheld a judgment holding an officer or director liable for breach of or interference with a contract of their own corporation. *See Rennell v. Through the Green, Inc.*, No. M2006-01429-COA-R3-CV, 2008 WL 695874, *8 (Tenn. Ct. App. Mar. 14, 2008) (citing *Jenkins v. Gibbs*, No. E2001-01802-COA-R3-CV, 2002 WL 2029560, *1 (Tenn. Ct. App. Sept. 5, 2002) (finding genuine issue of material fact existed regarding officer's motive to procure breach of corporation's contract); *Lyne v. Price*, No. W2000-00870-COA-R3-CV, 2002 WL 1417177, *2 (Tenn. Ct. App. June 27, 2002) (noting liability of director contingent on motive apart from furthering corporation's best interest)). However, our courts have contemplated that a corporate director, officer or employee may be held liable for interference with such a contract if "he is acting outside the scope of his authority, acting with malice, or acting to serve his own interests." *Forrester*, 869 S.W.2d at 333 (quoting Fischer, *supra*).

Our Supreme Court relied on Prosser & Keeton's review of the factors upon which an officer or director's liability for interfering with a corporation's contract could be based:

> With intent to interfere as the usual basis of the action, the cases have turned almost entirely upon the defendant's motive or purpose, and the means by which he has sought to accomplish it. As in the cases of interference with contract, any manner of intentional invasion of the plaintiff's interests may be sufficient if the purpose is not a proper one. Apart from this, however, the means adopted may be unlawful in themselves; and violence or intimidation, defamation, injurious falsehood or other fraud, violation of the criminal law, and the institution or threat of groundless civil suits or criminal prosecutions in bad faith, all have been held to result in liability, and there is some authority which limits liability to such cases.

Id. at 332-33 (quoting W. Page Keeton, PROSSER & KEETON ON THE LAW OF TORTS § 130, pp. 1009-10 (5th ed. 1984)).

Sanford's complaint alleges that the Defendants purchased shares of and had a personal interest in SecureOne, asserted a meritless counterclaim and action to avoid paying Sanford, and attempted to dissipate the assets of SecureOne in furtherance of that effort. In paragraph 24, Sanford then cited nine examples of Troy and Carol Waughs' "self-serving conduct [working] to the detriment of SecureOne and its creditors." We hold that Sanford has sufficiently alleged a cognizable right of action against the Waughs as officers and directors of SecureOne for the intentional interference with the Sanford Note and Settlement Agreement underlying Sanford's conspiracy claim. We note that the action is limited to Troy and Carol Waugh and not Waugh & Co. since the only allegations of intent and self-serving conduct in the amended complaint are specific to them.

Because we have reversed the trial court's dismissal of Sanford's claim for civil conspiracy, the exclusion of evidence bearing on Troy and Carol Waugh's intent to interfere with the Sanford Note or evidence of an overt act in furtherance of the conspiracy to avoid paying the Sanford Note are also reversed. Sanford is entitled to a trial on this issue with fresh determinations on the admissibility of evidence that supports the claim and whatever damages the jury may award should they find the Waughs liable for conspiracy.[12] However, we decline to render an advisory opinion regarding the admissibility of such evidence in any future proceedings. *See State v. Rodgers*, 235 S.W.3d 92, 97 (Tenn. 2007) ("Courts may not issue advisory rulings."); *King v. Danek Med., Inc.*, 37 S.W.3d 429, 461 (Tenn. Ct. App. 2000).

Summary Judgment on Sanford's Conversion Claim

Sanford argues that summary judgment was improper on his claim for conversion because questions of fact exist regarding his security interest in the tangible property of SecureOne and the

[12] Sanford argues that the court erred by omitting civil conspiracy from the verdict form because it prevented the jury from awarding damages for that conspiracy. The verdict form in the first trial allowed the jury to find that the Defendants conspired to maliciously prosecute the Waugh Litigation and/or SecureOne's counterclaim and to fraudulently transfer SecureOne assets but did not permit the jury to award damages for these conspiracies.

value of assets sold. The trial court dismissed the claim after granting the Waughs' motion to reconsider finding that the property valuations Sanford offered were not competent. We agree.

Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). In reviewing a summary judgment, this court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50 (Tenn. 1997). The party seeking summary judgment bears the burden of demonstrating that no genuine disputes of material fact exist and that the party is entitled to judgment as a matter of law. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). We must take the strongest legitimate view of the evidence in favor of the non-moving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence. *Id.*; *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). If there is a dispute as to any material fact or if there is any doubt as to the existence of a material fact, summary judgment cannot be granted. *Byrd*, 847 S.W.2d at 210; *EVCO Corp. v. Ross*, 528 S.W.2d 20, 25 (Tenn. 1975). To shift the burden of production to a nonmoving party who bears the burden of proof at trial, a moving party must negate an element of the opposing party's claim or "show that the nonmoving party cannot prove an essential element of the claim at trial." *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 9 (Tenn. 2008).

Conversion is the wrongful appropriation of the tangible property of another; an action for the conversion of intangible personal property is not recognized in Tennessee. *Ralph v. Pipkin*, 183 S.W.3d 362, 368 (Tenn. Ct. App. 2005). Generally, the appropriate measure of damages in a conversion action is determined by the fair, reasonable market value of the property at the time and place of conversion. *Franklin Capital Assocs., L.P. v. Almost Family, Inc.*, 194 S.W.3d 392, 406 (Tenn. Ct. App. 2005) (citing *Lance Prods., Inc. v. Commerce Union Bank*, 764 S.W.2d 207, 213 (Tenn. Ct. App. 1988)). The market value is not the only measure of damages recoverable in a conversion action. *Id*. at 407 n.3 (citing 18 AM. JUR. 2d, *Conversion* § 116 (2005)). In Tennessee, a property owner may offer opinion testimony on the value of his property; otherwise, expert valuation testimony will be required. *Sikora v. Vanderploeg*, 212 S.W.3d 277, 284 n.5 (Tenn. Ct. App. 2006); Tenn. R. Evid. 701(b).

Sanford relies on the Security Agreement in which SecureOne granted Sanford a security interest in "all personal and fixture property of every kind and nature, including without limitation all goods (including inventory, equipment, and any accessions thereto) owned by the Debtor."[13] Sanford's main argument is that the Defendants "sold at reduced prices or conveyed for no consideration whatsoever SecureOne's furniture, equipment, and vehicles over Sanford's lien." While Sanford may have had a secured interest in these assets, he did not have ownership of or title

[13] Sanford concedes that the Security Agreement did not cover intangible property, such as SecureOne's telephone number. Sanford subsequently perfected his lien in SecureOne's property by filing a UCC-1 statement dated January 8, 2003, of its $2 million indebtedness with the Tennessee Department of State.

to these assets.[14] "Under the UCC, default does not divest a debtor of all right and interest in the secured property, nor is the secured party, the creditor, vested with the unlimited power to deal with the property as it wishes." *Haraway v. Burnett*, No. 02A01-9508-CH-00179, 1997 WL 563224, *12 (Tenn. Ct. App. Sept. 8, 1997) (quoting *Comer v. Green Tree Acceptance, Inc.*, 858 P.2d 560, 563 (Wyo. 1993)). Sanford offered no other valuation testimony to refute the Defendants' evidence that the assets were sold at market value or to create a genuine issue of material fact to survive summary judgment. We affirm the judgment of the trial court on this basis and, therefore, need not address Defendants' remaining arguments in support of this result.

Denied Motion for Summary Judgment on Fraudulent Conveyance Claims

The Waughs assert that the trial court erred in denying their motion for summary judgment on Sanford's remaining fraudulent transfer claims. The Waughs contend that Sanford should be barred from asserting the claim by the doctrine of judicial estoppel because he asserted two inconsistent positions regarding SecureOne's solvency. In the SecureOne Litigation, Sanford argued that the company was solvent[15] when it breached the contract and prevailed. In order to recover for fraudulent conveyance in the current litigation, Sanford argued that SecureOne was insolvent or became insolvent as a result of the Waughs' alleged fraudulent transfers. Upon Defendants' motion, the trial court found judicial estoppel did not apply since there was no identity of issues or parties.

In general, the doctrine of judicial estoppel prevents litigants from taking contradictory positions in separate lawsuits or judicial proceedings. *Sibley v. McCord*, 173 S.W.3d 416, 419 (Tenn. Ct. App. 2004). "Where one states under oath in former litigation, either in a pleading, a deposition or on oral testimony, a given fact as true, one will not be permitted to deny that fact in subsequent litigation, although the parties may not be the same." *Id.* (citing *Melton v. Anderson*, 222 S.W.2d 666, 669 (Tenn. Ct. App. 1948)). However, the doctrine applies only where "the previous statement was not only untrue but was *willfully false* in the sense of conscious and deliberate perjury." *S. Sec. Fed. Credit Union v. Cumis Ins. Soc'y, Inc.*, No. W2004-02700-COA-R3-CV, 2005 WL 3527662, *10 (Tenn. Ct. App. Dec. 27, 2005) (quoting *Monroe County Motor Co. v. Tenn. Odin Ins. Co.*, 231 S.W.2d 386, 393 (Tenn. Ct. App. 1950)). Judicial estoppel will not apply when "there is an explanation showing such statement was . . . anything short of a 'wilfully false' statement of fact." *D.M. Rose & Co. v. Snyder*, 206 S.W.2d 897, 906 (Tenn. 1947); *see also Woods v. Woods*,

[14] We find no authority by which the holder of a security interest in property has the same rights as the property owner for purposes of valuation. Similarly, Sanford's role as previous owner does not permit him to offer competent valuation testimony of the property. The only case uncovered in our research where a previous property owner was held competent to testify to the value of a tract of land was so because title was only loaned to the corporation and "he remained the equitable owner because he was contractually entitled to reconveyance." *Wall v. Thalco, Inc.*, 614 S.W.2d 803, 806 (Tenn. Ct. App. 1981).

[15] SecureOne asserted a counterclaim based on Tenn. Code Ann. § 48-16-401 which would render the Sanford Note void if the court found it caused the company to become insolvent. In its final judgment in the SecureOne Litigation, the trial court found that "[t]he agreement to pay Mr. Sanford . . . did not render SecureOne unable to pay its debt as they came due in the ordinary course of business and accordingly, there was no violation of T.C.A. § 48-16-401."

638 S.W.2d 403, 406 (Tenn. Ct. App. 1982) ("The doctrine of judicial estoppel applies only where there has been a willful misstatement of fact-that is, perjury.").

We cannot say that Sanford's contradictory positions rose anywhere near the level of deliberate falsehood necessary to bar his fraudulent conveyance claim based on judicial estoppel. Once Sanford sold his shares of SecureOne, he was no longer privy to information about the company's financial condition. When SecureOne stopped paying on the Sanford Note, Sanford believed SecureOne had funds to pay him. The Waughs indicated as much when they offered him cash in January 2004. A review of Sanford's pleadings in both cases shows that Sanford believed that SecureOne was solvent when he left the company in 2002 and in 2003 when it was making payments on the Sanford Note and that SecureOne became insolvent as a result of the Defendants' actions in 2003 and 2004. In our opinion, nothing about these positions is in conflict or constitutes a willful misstatement of fact.

Summary Judgment on Sanford's Claim for Breach of Fiduciary Duty

Sanford next appeals the dismissal of his claim for breach of fiduciary duty. The trial court determined that Sanford, as creditor of SecureOne, was not entitled to bring a direct action against the officers and directors of the insolvent corporation. Whether a creditor may assert a direct claim for breach of fiduciary duty against the officers and directors of an insolvent corporation is a question of first impression in Tennessee. We find that, in certain circumstances, a creditor may seek relief against an officer or director individually for breach of fiduciary duty.

Officers and directors of a corporation are agents of the corporation and, as a general rule, are only liable to the corporation. *Merriman v. Smith*, 599 S.W.2d 548, 555 (Tenn. Ct. App. 1979). They do not typically stand in a fiduciary relationship with the corporation's creditors. Yet a majority of jurisdictions have held that an officer or a director may owe a fiduciary duty to corporate creditors, especially when the corporation becomes insolvent and the insider has a personal pecuniary interest in the corporation. *Smith v. Cox*, 831 P.2d 981, 984 (N.M. 1992); *Poe & Assocs., Inc. v. Emberton*, 438 So. 2d 1082, 1085 (Fla. Dist. Ct. App. 1983) (holding a corporate creditor has a cause of action against a director to whom the corporation paid a pre-existing debt at a time when it was insolvent); *Union Coal Co. v. Wooley*, 154 P. 62, (Okla. 1915) (affirming liability of directors of insolvent corporation for breach of fiduciary duty alleged by creditor since directors were trustees of corporate assets for creditors and not permitted to prefer their own prior unsecured debts to the injury of other creditors).

In this case, the trial court concluded that, in the absence of Tennessee law, our courts would adopt the principle that a creditor cannot bring a direct cause of action against directors of an insolvent corporation. The trial court was initially persuaded by Sanford's argument and reliance on *Intertherm, Inc. v. Olympic Homes Sys., Inc.*, 569 S.W.2d 467 (Tenn. Ct. App. 1978), for the majority view that officers and directors of an insolvent corporation owe a fiduciary duty to creditors. However, the Defendants filed notice of supplemental case law, *North American Catholic Education*

Programming Foundation, Inc. v. Gheewalla, 930 A.2d 92 (Del. 2007), and the court relied on this case in its July 7, 2007 order. The chancellor found the following reasoning of the Supreme Court of Delaware particularly persuasive:

> It is well established that the directors owe their fiduciary obligations to the corporation and its shareholders. While shareholders rely on directors acting as fiduciaries to protect their interests, creditors are afforded protection through contractual agreements, fraud and fraudulent conveyance law, implied covenants of good faith and fair dealing, bankruptcy law, general commercial law and other sources of creditor rights. Delaware courts have traditionally been reluctant to expand existing fiduciary duties.

Gheewalla, 930 A.2d at 99. The trial court determined that, in order for the claim to stand, Sanford needed to file a derivative suit on behalf of all SecureOne creditors or all the creditors needed to assert the claim.

However, this court has previously recognized that officers and directors have a duty not to act to the unfair detriment of certain interested third parties lacking the power of a fiduciary:

> As a fiduciary, the officer or director has a strong influence on how the corporation conducts its affairs, and a correspondingly strong duty not to conduct those affairs to the unfair detriment of others, *such as minority shareholders or creditors*, who also have legitimate interests in the corporation but lack the power of the fiduciary.

Intertherm, 569 S.W.2d at 471 (emphasis added). We are persuaded by the reasoning of *Intertherm* and think the circumstances in this case demonstrate why any rule to the contrary would work against stated principles of equity and corporate law.

The question in *Intertherm* was whether the shareholders' security interest in the personal property of the corporation was valid and whether it entitled them to a priority over general corporate creditors. *Intertherm*, 569 S.W.2d at 468. In Tennessee, "courts will closely scrutinize the transactions of a majority, dominant, or controlling shareholder with his corporation, and will place the burden of proof upon the shareholder when the good faith and fairness of such a transaction is challenged." *Id*. at 471-72. The court stated that the reason transactions with majority shareholders are so closely scrutinized is the same reason the rule is applied to transactions with officers and directors: because they occupy "a fiduciary position with regard to the corporation and those interested in it." *Id*. at 472. We read *Intertherm* as permitting minority shareholders and creditors to challenge the good faith and fairness of transactions between majority shareholders, officers, or directors and the corporation. *See id*. at 471. We note that the plaintiffs in *Intertherm* were general creditors likening it to a derivative action asserted on behalf of all the creditors and that this was one reason for the trial court to dismiss Sanford's claim. In this instance, the officers and directors were also the sole shareholders of the corporation and substantial creditors of the corporation. A case such as this requires close scrutiny of the Waughs' transactions directing payments to themselves. *See*

id. at 472. Sanford has adequately challenged the Defendants' intent and, it appears to us, raised serious questions about whether the Waughs' decision to prefer the debts of other creditors was a direct action targeted against him. Accordingly, we do not believe Sanford was required to file a derivative action on behalf of SecureOne's creditors in order to recover for the Defendants' breach of fiduciary duty to him.

Officers and directors of a close corporation "are required to act in the utmost good faith, and . . . they impliedly undertake to give to the enterprise the benefit of their care and best judgment and to exercise the powers conferred solely in the interest of the corporation ... and *not for their own personal interests*." *McRedmond v. Estate of Marianelli*, 46 S.W.3d 730, 738 (Tenn. Ct. App. 2000) (quoting 18B AM. JUR. *Corporations* § 1689) (emphasis added). Corporate law imposed this fiduciary duty in recognition of the potential for abuse in separating the powers of the equity owners and managers of the corporate entity. *See* Ann E. Conaway Stilson, *Reexamining the Fiduciary Paradigm at Corporate Insolvency and Dissolution: Defining Directors' Duties to Creditors*, 20 DEL. J. CORP. L. 1, 5 N.9 (1995). This duty has been extended to creditors at or in the vicinity of the entity's insolvency. *Id*. at 62.

The majority of jurisdictions do not allow an insolvent corporation to prefer its own directors and officers. *See Smith*, 831 P.2d at 983; *Wooley*, 154 P. at 63. These jurisdictions recognize that, as fiduciaries, officers and directors "cannot be allowed to use their position and superior inside knowledge to benefit themselves at the expense of third-party creditors." *Id.* The Supreme Court of New Mexico explained the majority rule as follows:

> When a corporation becomes insolvent and can no longer continue in business, the directors and other managing officers occupy a fiduciary relation towards creditors by reason of their position and their custody of the assets. Therefore, directors and officers who are also creditors of the insolvent corporation cannot, by conveyance, mortgage, pledge, confession of judgment, or otherwise secure to themselves any preference or advantage over other creditors. The most that they can claim, in the absence of a prior perfected interest or priority claim, is the right to come in and share pro rata with the creditors in the distribution of the assets * * *. This is especially true with respect to a preexisting debt.

Id. at 983-84 (quoting William M. Fletcher, 15A FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7469 (perm. ed. rev. vol. 1990)).

We think the better rule is the majority rule and hold that a creditor to an insolvent corporation or a corporation on the verge of insolvency may assert an action for breach of fiduciary duty against officers or directors who are also creditors to the corporation when they have been given preference in their preexisting debt or have engaged in self-dealing conduct. In expounding this rule, we agree that "[t]he fiduciary duty of an insolvent corporation's directors and officers to preserve and protect the assets of the corporation does not extend beyond the prohibition against self-dealing or preferential treatment." *Helm Fin. Corp. v. MNVA R.R., Inc.*, 212 F.3d 1076, 1081 (8th Cir. 2000);

see also Deadrick v. Bank of Commerce, 45 S.W. 786, 787 (Tenn. 1898) (recognizing that insider's wrongful divestiture of corporate assets, fraud, or self-dealing would affect application of general rule); *Tenn. Racquetball Investors, Ltd. v. Bell*, 709 S.W.2d 617, 619 (Tenn. Ct. App. 1986) (pretrial order recognizing fiduciary theory as among those by which a creditor could assert a direct action against corporate officer not appealed). Accordingly, a director or officer may not take advantage of his or her superior means of information to secure or satisfy his or her own preexisting debt against the corporation. *See* 18B AM. JUR. 2d *Corporations* § 1856 (citing *Hill v. Pioneer Lumber Co.*, 18 S.E. 107, 109 (N.C. 1893) (holding insider "fiduciaries to the duty which bids them put self-interest behind that of the creditors, who have not the same means of information, which might enable them to protect themselves.")). It would be inequitable to allow interested insiders to protect their claims to the detriment of other creditors.

We find *Merriman v. Smith*, a case on which the Waughs rely, easily distinguishable from the circumstances of this case. There, creditors sued directors for neglect and mismanagement of the corporation. *Merriman*, 599 S.W.2d at 552. The court related that, if a director becomes personally liable to a creditor, "it must be by statute or by some conduct which creates a privity of contract between them, or which results in a tortious injury to the creditor for which an action ex delicto will lie." *Id*. at 555 (quoting *Hume v. Commercial Bank*, 77 Tenn. 728, 747 (1882)). This rule does not conflict with our holding today since the important factors for imposing personal liability against the director are based on the insider's self-dealing.

Because we limit a creditor's right to bring a breach of fiduciary claim against individual insiders to cases involving self-dealing or preference, we avoid the concerns expressed in *Gheewalla* and by the trial court:

> Recognizing that directors of an insolvent corporation owe direct fiduciary duties to creditors, would create uncertainty for directors who have a fiduciary duty to exercise their business judgment in the best interest of the insolvent corporation. To recognize a new right for creditors to bring direct fiduciary claims against those directors would create a conflict between those directors' duty to maximize the value of the insolvent corporation for the benefit of all those having an interest in it, and the newly recognized direct fiduciary duty to individual creditors.

Gheewalla, 930 A.2d at 103. The defendant-directors in *Gheewalla* were not accused of self-dealing; rather, their business judgment was challenged and they were accused of acting on behalf of their employer, an interested investor of the corporation. We adopt the holding in *Gheewalla* to the extent it states the general rule that creditors may not assert a direct action against officers and directors of an insolvent corporation absent self-dealing or preference. We find that genuine issues of material fact exist as to whether the Waughs were given insider preferential treatment. In addition, we find Sanford challenged the Waughs' transactions sufficiently to shift the burden of proof to the Waughs to show the transactions were fair and in good faith. *See Intertherm,* 569 S.W.2d at 471-72. The judgment of the trial court dismissing Sanford's claim for breach of fiduciary

sduty is therefore reversed. Sanford may proceed against Defendants for breach of fiduciary duty and present evidence related only to those self-dealing transactions enumerated in his amended complaint.

Denied Directed Verdict on Fraudulent Transfer Claim

The Waughs also appeal the denial of their motion for a directed verdict on Sanford's fraudulent transfer claim. A directed verdict may be granted "only when the evidence is susceptible to but one conclusion." *Alexander v. Armentrout*, 24 S.W.3d 267, 271 (Tenn. 2000). Our review of the trial court's ruling on a motion for directed verdict is de novo and does not allow us to reweigh the evidence or reevaluate the credibility of witnesses. *Johnson v. Tenn. Farmers Mut. Ins. Co.*, 205 S.W.3d 365, 370 (Tenn. 2006); *Benson v. Tenn. Valley Elec. Coop.*, 868 S.W.2d 630, 638-39 (Tenn. Ct. App. 1993). Instead, we "must take the strongest legitimate view of the evidence in favor of the non-moving party, construing all evidence in that party's favor and disregarding all countervailing evidence" to determine whether reasonable minds could differ as to the conclusions drawn from that evidence. *Johnson*, 205 S.W.3d at 370; *Alexander*, 24 S.W.3d at 271.

Because the claim was submitted to the jury and a verdict was returned in favor of Sanford, we can set aside the jury's factual findings "only if there is no material evidence to support the verdict." Tenn. R. App. P. 13(d). Accordingly, "[i]f there is material evidence to support the jury's findings, then, of necessity, granting a directed verdict for the losing party would have been improper because the evidence permitted reasonable minds to reach a conclusion different from that asserted by the losing party." *Potter v. Ford Motor Co.*, 213 S.W.3d 264, 268 (Tenn. Ct. App. 2006) (quoting *In re Estate of Brindley*, No. M1999-02224-COA-R3-CV, 2002 WL 1827578, *2 (Tenn. Ct. App. Aug. 7, 2002)). In this case, the jury found that Carol Waugh, Troy Waugh, and Waugh & Co. each "received fraudulent transfers, including money, of SecureOne, Inc."

A brief review of the law and the evidence offered at trial demonstrates that there was material evidence to support the verdict. A transfer by a debtor is fraudulent as to a creditor if made "without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation." Tenn. Code Ann. § 66-3-306(a) (2003). In Tennessee, a fraudulent conveyance of assets made with the intent to "defraud creditors of their just and lawful actions, suits, debts, accounts, damages, penalties, [or] forfeitures" is void. Tenn. Code Ann. § 66-3-101. The Waughs maintain that the $900,000 they paid to SecureOne on December 19, 2002, "constituted a loan as a matter of law and was reasonably equivalent value in exchange for the interest payments it made to the Waughs." The Waughs contend that SecureOne's ability to use the loaned money over time justified charging interest on those loans and that the more than $106,000 in interest was reasonable. Sanford argued that the money was really a purchase of an interest in SecureOne and did not justify the large payments of interest. Sanford also challenged the Defendants on the amount charged for consulting services as compared to the services actually provided.

The consulting fee and interest payment totals were stipulated.[16] The proof showed that SecureOne paid the Defendants consulting fees totaling $105,000 in 2004 and early 2005. SecureOne paid the Defendants over $106,000 in interest beginning in March 2003 to February 2005. Sanford introduced into evidence the invoices generated by Waugh & Co., Troy and Carol Waugh, and Carol & Co. for consulting fees and interest, most of which were numbered sequentially. None of the consulting invoices indicated what services were performed on behalf of SecureOne or the time spent consulting. At trial, Troy Waugh stated he had an active role in the day-to-day management of SecureOne, reviewed company performance and financials, and assisted with the sale of company assets, among other things. Carol Waugh testified that she mostly prepared the minutes for the Board of Directors' meetings and attended meetings with SecureOne's attorney; she was not involved in the daily operation. Sanford used Defendants' invoices to argue that the interest and consulting fees charged were fraudulent transfers on "sham loans." In particular, Sanford claimed the invoices were backdated and generated at the same time and that the consulting invoices were for services that were not rendered in amounts that were not justified. There was material evidence upon which the jury could conclude that the Defendants received the interest payments and/or consulting fees as fraudulent transfers from SecureOne.

Denied Directed Verdict on Malicious Prosecution Claim

We review the Defendants' next issue under the same standard stated above because the claim for malicious prosecution was also submitted to the jury following the denial of a directed verdict on that claim. The jury specifically found that Carol Waugh, Troy Waugh, and Waugh & Co. each maliciously prosecuted an action against Sanford. On appeal, the Waughs argue that Sanford failed to prove they instituted the prior lawsuit without probable cause or with malice and, therefore, the trial court should have directed a verdict in their favor on the malicious prosecution claim. Defendants also claim the trial court erred in instructing the jury that malice may be inferred if the jury found the Waughs acted without probable cause.

To prevail on a claim for malicious prosecution, a plaintiff must prove that: (1) a judicial proceeding was instituted by the defendant and finally resolved in the plaintiff's favor; (2) the defendant instituted the proceeding without probable cause; and (3) the defendant acted with malice. *Wright Med. Tech., Inc. v. Grisoni*, 135 S.W.3d 561, 581-82 (Tenn. Ct. App. 2001). This court has previously examined the claimant's heavy burden of proving malicious prosecution, especially in establishing the accused's lack of probable cause and malice:

[16]The breakdown of consulting fee payments made to Troy Waugh/Waugh & Co. is as follows: $10,000 on February 17, 2004; $5,000 on March 17, 2004; $5,000 on April 2, 2004; $45,000 on December 6, 2004; and $10,000 on February 1, 2005 totaling $75,000. SecureOne paid Carol Waugh a total of $30,000 in consulting fees as follows: $4,000 on February 17, 2004; $2,000 on March 17, 2004; $2,000 on April 2, 2004; $18,000 on December 6, 2004; and $4,000 on February 1, 2005. SecureOne made the following interest payments to Waugh & Co. totaling $50,783: $16,050 in 2003; $32,783 in 2004; and $1,950 in 2005. SecureOne paid Troy and Carol Waugh a total of $55,991 in interest, paying $19,494 in 2003 and $36,497 in 2004.

> Probable cause exists where the original plaintiff possessed a reasonable belief in both the existence of facts supporting his claim and that those facts made out a legally valid claim. The reasonableness of the defendant's belief and conduct is a factual determination. The plaintiff may rely on the advice of counsel as to the validity of the claim where the advice is sought in good faith and is given after fair and complete disclosure of all relevant facts in his possession and all facts he could have ascertained by reasonable diligence. As to malice, the claimant need not prove ill will or personal hatred, so long as he demonstrates an improper motive. While malice may be inferred from a total absence of probable cause, no amount or kind of malice is sufficient to establish lack of probable cause.

Id. at 581-82 (citations omitted).

At trial, the court denied the Waugh's motion for directed verdict based on the testimony of other witnesses as compared with Mr. Evans' testimony and determined "that different inferences can be drawn and that there is a question of credibility." Mr. Evans testified that he based the lawsuit on Sanford's alleged representation to Mr. Prow in or around December 2002. As Mr. Evans understood, Sanford "allegedly said that all debts were paid - - no. They didn't owe anything other than what was on the financial statement and all debts were current." Mr. Evans learned of the alleged representation from Troy Waugh but did not talk with Mr. Prow regarding the statement. He could not recall whether he actually saw the November financial statement or not. Mr. Evans could not recall whether the representation was made in November or December, just that it occurred before the closing because "[i]t would have been irrelevant if it came after the closing." Mr. Evans admitted that whatever financial statement he reviewed in preparing the complaint was a draft and not the final statement. He also relied on the accountant's report of SecureOne's debts/expenses of $434,981.55 in drafting the complaint[17] and claimed that the "past due" language appearing in the complaint was a mistake. Mr. Evans testified that the Waughs were cooperative, accessible, and provided him with all the information he requested of them.

Sanford testified that he never talked with Troy or Carol Waugh in November or December 2002 and never made any representation to them concerning SecureOne's liabilities. Sanford stated that SecureOne had $500,000 in the bank when he sold his shares to Mr. Prow and that SecureOne's practice was to pay its bills every Thursday. According to Sanford, the expenses on the accountant's report demonstrate that the Waughs' misrepresentation claim was baseless and that the commission of the report evidences their ill will toward him. In addition, Sanford produced the $18.75 check and envelope as further evidence of malice. Sanford perceived the check as a "slap in the face" given the amount of the check and Ms. Waugh's return address label with a large red heart printed on it.

Based on the above, we find there was material evidence to support the jury's verdict in favor of Sanford on the malicious prosecution claim. Furthermore, we find it reasonable for the jury to

[17] There was conflicting evidence at trial whether the Waughs had requested the accountant's report before meeting with Mr. Evans or at his request following their initial meeting.

conclude there was no probable cause, and therefore, it was permissible for them to infer malice, if necessary; however, the jury made no special findings of either actual or inferred malice.

Directed Verdict on Punitive Damages

Next, Sanford appeals the trial court's grant of a directed verdict with respect to punitive damages based upon its finding that Sanford did not meet the clear and convincing burden of proof required. Sanford contends he presented clear and convincing evidence that the Waughs acted with malice and fraud and that their conduct was egregious. Sanford relies on the fact that the jury returned a verdict in his favor on the malicious prosecution claim to suggest that the jury could have found clear and convincing evidence that the Waughs acted with malice.[18] By prevailing on the malicious prosecution claim, Sanford presented evidence that convinced the jury that the Waughs acted without probable cause and with malice.[19]

In 1992, the Supreme Court of Tennessee limited the circumstances in which punitive damages could be awarded and prescribed procedures to ensure that punitive damages were not arbitrarily and capriciously awarded. *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992). The Court limited awards for punitive damages to cases in which the defendant acted intentionally, fraudulently, maliciously, or recklessly. *Id*. at 901. The issue in this appeal is whether the Defendants acted with intent, fraud, or malice. The Court went on to define the type of conduct warranting punitive damages, stating that "[a] person acts intentionally when it is the person's conscious objective or desire to engage in the conduct or cause the result." *Id*. A person acts fraudulently when that person intentionally misrepresents an existing, material fact or gives a false impression intended to mislead another or to obtain an undue advantage, and when another is injured when reasonably relying upon that representation. *Id*. And, for purposes of punitive damages, a person acts maliciously when "motivated by ill will, hatred, or personal spite." *Id*.

Because punitive damages are intended to punish and to deter, plaintiffs must prove the defendants conduct by clear and convincing evidence. *Hodges*, 833 S.W.2d at 901. "Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Id.* at n.3. The Supreme Court expressly stated that determination of liability for punitive damages is a question reserved for the factfinder. *Id*. It has long been held that the trial court's duty is "to determine whether there is material evidence which would justify the award of punitive damages but the allowance of such punitive

[18] The trial court previously ruled that punitive damages were not recoverable on Sanford's fraudulent conveyance claim and Sanford did not appeal this issue.

[19] We note that, generally, the malice required to prove malicious prosecution does not automatically rise to the level of malice required to recover for punitive damages. *Compare Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992) (to prove punitive damages warranted on basis of malice, plaintiff must show defendant motivated by ill will, hatred, or personal spite), *with Wright Med. Tech., Inc. v. Grisoni*, 135 S.W.3d 561, 582 (Tenn. Ct. App. 2001) (malice required to prove malicious prosecution need not prove ill will or personal hatred, simply improper motive).

damages is a matter of discretion with the jury." *Odom v. Gray*, 508 S.W.2d 526, 533 (Tenn. 1974); *see also Duran v. Hyundai Motor Am., Inc.*, 271 S.W.3d 178, 207 (Tenn. Ct. App. 2008) (trial court to determine whether punitive damages claim is submissible based on sufficient, clear and convincing evidence and inferences reasonably drawn therefrom).

In considering the arguments of counsel, the trial court recognized that Sanford offered proof of malice but questioned whether Sanford presented clear and convincing proof of malice. Taking the strongest legitimate view of the evidence, we find reasonable minds could reach different conclusions as to whether Sanford offered clear and convincing proof that Defendants acted maliciously or fraudulently. *See Johnson*, 205 S.W.3d at 370. As the trial court acknowledged in its June order denying summary judgment and at trial, Sanford presented evidence from which the jury could conclude the Waughs acted fraudulently in filing their claim. There were questions about whether the Waughs sought Mr. Evans' advice in good faith and whether they provided complete and truthful information to Mr. Evans in filing the complaint against Sanford, particularly with respect to the November financial statement and alleged conversation between Sanford and Bruce Prow. There was also evidence of malice and ill will between Sanford and the Defendants. Although the Waughs contend the only evidence of malice was the check from Carol Waugh, reasonable minds could differ on what conclusions could be drawn from the entirety of evidence presented. *See Hughes v. Lumbermens Mut. Cas. Co., Inc.*, 2 S.W.3d 218, 227 (Tenn. Ct. App. 1999) (reversing directed verdict on punitive damages to submit all the evidence to jury for determination of whether it met the standard of proof, even if evidence of fraudulent intent was tenuous). We find the trial court erred in granting a directed verdict on Sanford's request for punitive damages and that the issue should have been submitted to the triers of fact.

Exclusion of Witness John Jacobson

The trial court granted the Waughs' motion in limine to exclude John Jacobson as a witness at trial based on unfair surprise and substantial prejudice caused by Sanford's failure to identify him as a person having knowledge of relevant facts prior to the close of discovery. Sanford argues that Defendants knew Mr. Jacobson was a person with knowledge of the facts and circumstances relevant to this case and that his omission from the interrogatories was merely an oversight.

We review the trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 131 (Tenn. 2004). A trial court abuses its discretion only when it applies an incorrect legal standard or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining. *Id*. (quoting *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001)). In his brief, Sanford concedes that the exclusion of Mr. Jacobson was harmless error and thereby waives the issue on appeal. Again, we decline to render an advisory opinion regarding the admissibility of such evidence in any future proceedings. *See Rodgers*, 235 S.W.3d at 97; *King*, 37 S.W.3d at 461.

Conclusion

For the reasons stated herein, we affirm the dismissal of Sanford's claims for conversion, affirm the denials of summary judgment and directed verdict motions on fraudulent conveyance, and affirm the denial of directed verdict on the malicious prosecution claim. The judgment of the trial court is reversed on its limitation of the claim for civil conspiracy and its dismissal of Sanford's claim for breach of fiduciary duty. We also find the trial court erred in granting a directed verdict on Sanford's request for punitive damages. The issues hereby reversed are remanded for a new trial before a jury. The trial and evidence related to the punitive damage award shall remain bifurcated and conducted in two phases as before. Costs of appeal are assessed one half to the appellant, Michael Sanford, and one half to the appellees, Troy Waugh, Carol Waugh, and Waugh & Co.

_____

ANDY D. BENNETT, JUDGE